

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Stephen C. Ballard,

Civ. No. 09-679 (PAM/SRN)

Plaintiff,

v.

**ORDER**

Carol Holinka,

Defendant.

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This matter is before the Court on the Report and Recommendation (“R&R”) of Magistrate Judge Susan Nelson, dated January 25, 2010, to deny Defendant’s Motion to Dismiss.

Plaintiff Stephen Ballard was formerly a prisoner at the Federal Correctional Institution in Waseca, Minnesota. Defendant Carol Holinka served as warden of the facility during the relevant time period. Ballard alleges that Holinka unconstitutionally prohibited him from receiving a July 2006 issue of American Curves magazine and limited his access to stamp purchases.

The Motion before the Court is Holinka’s Motion to Dismiss, filed on the ground that Holinka was not properly served. As Magistrate Judge Nelson explained, Rule 12 provides that for any defense listed in Rule 12(b)(2)-(5) “a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.” Fed. R. Civ. P. 12(g)-(h). Holinka previously filed a motion to dismiss under Rule 12(b)(1), (2), (3), and (6). (Docket No. 12).

But Holinka did not assert her Rule 12(b)(5) insufficient service of process defense at that time. As a result, she waived the defense.

Furthermore, Holinka had until February 9, 2010, to file any objections to the R&R. No objections were filed. The Court therefore **ADOPTS** the R&R (Docket No. 29), and **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss (Docket No. 23) is **DENIED**.

Dated: February 12 , 2010

s/Paul A. Magnuson  
Paul A. Magnuson  
United States District Court Judge